IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 25TH SEPTEMBER 2007 / 3RD ASWINA 1929

SA.No. 819 of 2002()

(AGAINST THE JUDGMENT AND DECREE IN AS.28/2001 DATED 11/07/2002 OF THE SUB COURT, TRICHUR, FILED AGAINST THE JUDGMENT AND DECREE IN OS.187/1992 OF THE MUNSIFF'S COURT, WADAKKANCHERRY)

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APPELLANT: RESPONDENT/PLAINTIFF:

SAROJINI, W/O.ALAMPETTY PARAMBIL RAMAN, KALLEPADAM AMSOM DESOM, PAZHAYANNOORE VILLAGE, THALAPPILLY TALUK, THRISSUR DISTRICT.

BY ADV. SRI.JOHN JOSEPH(ROY)

RESPONDENTS: APPELLANTS/DEFENDANTS:

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1. **APPUKUTTY, S/O.ALAMPETTY PARAMBIL KRISHNAN, KALLEPADAM AMSOM, PAZHAYANNORE VILLAGE, THALAPPILLY TALUK, THRISSUR DISTRICT.**

2. **AYYAPPAN, S/O.ALAMPETTY PARAMBIL KRISHNAN, KALLEPADAM AMSOM DESOM, PAZHAYANNOORE VILLGE, THALAPPILLY TALUK.**

3. **LAKSHMI, D/O.ALAMPETTY PARAMBIL KRISHNAN, KALLEPADAM, AMSOM DESOM, PAZHAYANNOORE VILLAGE, THALAPPILLY TALUK.**

BY ADV. SRI.P.VIJAYA BHANU
SRI.BIJU ZACHARIA. M

THIS SECOND APPEAL HAVING COME UP FOR ADMISSION ON 25/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

ORDER ON C.M.P.NO.2458/2002 IN S.A.NO.819/2002

DISMISSED

25/09/2007 **SD/-M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 819 OF 2002

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DATED THIS THE 25TH DAY OF SEPTEMBER, 2007

JUDGMENT

Plaintiff in O.S.187 of 1992 on the file of Munsiff Court, Wadakkancherry is the appellant. Respondents are defendants. Appellant instituted the suit seeking a decree for permanent prohibitory injunction contending that plaint schedule property was originally taken on lease by Raman, husband of appellant, 30 years back and thereafter under Ext.A1 gift deed in 1989, it was transferred to appellant and since then appellant has been in possession of the plaint schedule property and respondents insisted for division of plaint schedule property when they have no right over the property and they attempted to trespass into the property and therefore they are to be restrained by a permanent prohibitory injunction. Respondents in the written statement contended that Ext.A1 gift deed was fraudulently created and Raman had no exclusive right over the property and Krishnan, the father of Raman and respondents, was in possession of the property and after the death of Krishnan, all his properties devolved on the children including respondents and Ext.B4 agreement was executed for division of the

properties and appellant has no exclusive possession of the property and therefore she is not entitled to the decree sought for.

2. Learned Munsiff, on the evidence of PWs 1 and 2, Dws 1 to 3, Exts.A1 and A2, Exts.B1 to B4 and Exts.C1 and C1(a) upheld the case of appellant and granted a decree for permanent prohibitory injunction restraining respondents from trespassing into the property. Defendants challenged the decree and judgment before Sub Court, Thrissur in A.S.28 of 2001. Learned Sub Judge, on reappreciation of evidence, found that though respondents contended that there was no lease in favour of Raman, no evidence was let in to establish the lease. It was also found that there is no evidence to prove that Raman has been in exclusive possession of the property or that appellant is in possession of the property. It is on that basis, first appellate court allowed the appeal and dismissed the suit. It is challenged in the second appeal.

3. Learned counsel appearing for the appellant was heard. The argument of the learned counsel is that courts below did not properly appreciate the evidence and respondents are claiming right only under Ext.B1 purchase certificate and Ext.C1

report shows that property covered under Ext.B1 is different from the plaint schedule property and therefore first appellate court was not justified in interfering with the decree granted by trial court. Learned counsel also argued that evidence on record conclusively prove that appellant has been in exclusive possession of the plaint schedule property on the date of the suit and judgment of the first appellate court is to be set aside and that of trial court is to be restored.

4. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. The suit is only one for injunction simplicitor. The only question is with regard to possession. Though appellant has claimed possession of the property on the strength of Ext.A1 gift deed, what was transferred under Ext.A1 gift deed is the right obtained by her husband Raman and that too as per an oral lease. No evidence was adduced to substantiate her case that Raman has been in exclusive possession of the property prior to execution of Ext.A1. Ext.A1 is in the year 1989. Suit was filed in 1992. The only assessment receipts produced by appellant is of 1992, either after filing of the suit or prior to institution of the suit. Apart from the version of PW1 there is no evidence to prove that

Raman has been in exclusive possession of the property so as to transfer possession to the respondent. It is in such circumstances first appellate court appreciating the evidence found that appellant did not prove her possession of the property. That finding of fact cannot be interfered in exercise of the powers of this court under Section 100 of Code of Civil Procedure. Though learned counsel, relying on Ext.B1 argued that title under Ext.B1 available to the respondent is not to the plaint schedule property, the question of title is not to be decided in the suit. It is made clear that dismissal of the suit will not preclude respondent from instituting a suit on the strength of title.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-